inasmuch as a very large percentage of the capital stock of the companies was represented by property outside the state of Kansas and engaged in interstate commerce a tax measured upon the entire amount of capital stock was imposed upon property which the state had no power to tax and constituted a direct burden upon interstate commerce, stress being laid upon the latter point.

The court does not expressly overrule any of its earlier decisions. It seems impossible, however, to understand the cases otherwise than as a repudiation of one or more of the principles of the cases hereinbefore referred to. If the tax imposed by the New York statute considered in the *Horn Silver Mining Company* case was a tax or fee exacted for the privilege of doing domestic business in a corporate capacity within the state of New York, only a very small percentage of the company's capital being engaged within the state, it is indeed difficult to see how the tax in the principal cases was of a different nature. The method of measuring the taxes was the same and much the same objections were urged in both cases. So if the court meant to hold that the tax was a tax upon property without the state as distinguished from a license tax or fee for the privilege of doing domestic business, the cases in effect overrule the principle of the *Horn Silver Mining Co.* case. On the other hand if that view of the decision is not taken and the tax is considered as of the same nature as the one imposed in the *Horn Silver Mining Co.* case, the conclusion of the court can only be construed as denying the right of a state to freely tax the privilege of doing domestic business by corporations engaged in interstate commerce, thus in effect overruling the principle clearly established by the cases above cited, namely, that the intrastate busines of a foreign corporation is a proper subject of state taxation. The arguments against the holdings of the court in these two cases are so clearly and forcibly stated in the dissenting opinions of Mr. Justice HOLMES that it would be a mere matter of repetition to set them down here. R. W. A.

---

QUANTUM OF EVIDENCE NECESSARY TO SUSTAIN A PLEA OF JUSTIFICATION, TO A CIVIL ACTION OF LIBEL OR SLANDER, FOR CHARGING THE PLAINTIFF WITH A CRIME.—In civil cases it often happens that the nature of the defense is such that the only issue to be tried is as to whether or not the plaintiff is guilty of a crime. This occurred in the case of *Lay* v. *Linke,* — Tenn. —, 123 S. W. 746 ,a case decided by the supreme court of the state of Tennessee Dec. 31, 1909. The defendant, in that case, entered a plea of justification to an action for slander, in which the plaintiff alleged that the defendant had accused him of having committed the crime of perjury. The lower court held, that since the only issue raised by the defendant's plea was as to whether or not the plaintiff was guilty of a crime, it was necessary for him, in order that he might succeed, to establish the truth of his plea beyond a reasonable doubt. The supreme court held this error, ruling that a preponderance of evidence only is necessary to establish any issue in a civil case.

The rule followed by the lower court, in the above case, has given the courts of this country a great deal of trouble. It is often stated as being

the English rule. 2 ENCY. OF EVID. 787 *et seq.* Although it once received the sanction of such an authority on evidence as Greenleaf, it is now very generally disapproved of , both in the cases and in the recognized text books. The rule is stated in Vol. II GREENLEAF (16th Ed.) § 426, as follows: "To support a special plea in justification, where crime is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him; and it is conceived that he would be entitled to the benefit of any reasonable doubts of his guilt in the minds of the jury, in the same manner as in a criminal trial." A note to this section, by the authors of this edition, is to the effect that the rule, as thus stated by Greenleaf, is no longer supported by the weight of authority. The rule as thus stated seems still to be pretty well established in Indiana and Illinois. *Wintrode* v. *Renbarger,* 150 Ind. 556; *Wilson* v. *Barnett,* 45 Ind. 163; *Fowler* v. *Wallace,* 131 Ind. 347; *Crandall* v. *Dawson,* 6 Ill. 556; *Harbison* v. *Shook,* 41 Ill. 141; *Germania Fire Ins. Co.* v. *Klewer,* 129 Ill. 599; *Flannery* v. *The People,* 225 Ill. 62.

The lower court, in the case under discussion, was misled by a number of dicta found in previously decided Tennessee cases, one to the effect that "To prove or fix the charge (perjury) upon the plaintiff in a civil case should require the same quantum of proof which would be required to convict him upon a criminal prosecution." *Coulter* v. *Stuart,* 2 Yerg. (Tenn.) 225.

The absurdity of this rule is clearly shown by the following quotation from an article criticising it, by Judge MAY: "The plaintiff in a libel case charges the defendant with the commission of a crime—for libel is an indictable offense—in that he published that the plaintiff was a thief, and he is told that it is needful for him to prove his cause only by a preponderance of evidence; while the defendant who has said the plaintiff is a thief, and now justifies by saying that what he said is true, is told that he must prove the crime which he charges against the plaintiff beyond a reasonable doubt. In other words, the plaintiff charges the defendant with crime, and is allowed to prove it by a preponderance of evidence; while the defendant, who charges the plaintiff with crime, is required to prove it beyond all reasonable doubt." 10 AM. L. REV. 650.

Prof. WIGMORE states the rule which, according to the present weight of authority, controls the situation under discussion, in the following words: "But the chief topic of controversy has been whether in civil cases the measure of persuasion in criminal cases should be applied. Policy suggests that the latter test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case. Nevertheless, the effort has been made (though usually without success) to introduce it in certain sorts of civil cases where an analogy seems to obtain. It is sometimes said that, in general, wherever in a civil case a criminal act is charged, the rule in criminal cases should apply, but this has been generally repudiated." Vol. 4, WIGMORE ON EVID., § 2498. The following authorities are in support of the rule as thus laid down: NEWELL ON DEF. AND SLANDER, p. 795; COOLEY, TORTS, (Ed. 2) 208; *Hearne* v .*DeYoung.* 119 Cal. 670; *Finley* v. *Widner,* 112 Mich. 230; *Ellis* v. *Buzzell,* 60 Me. 209; *Sloan* v. *Gilbert,*

12 Bush. (Ky.) 51; *Kane* v. *Hibernia Ins. Co.*, 39 N. J. L. 697; *Atlanta Journal* v. *Mayson*, 92 Ga. 640; 2 ENCYC. OF EVID. 788, and cases there cited. As showing the change in the attitude of the state courts on this question, compare the following pairs of cases, the later one of which in each instance is in support of the rule as stated by Prof. WIGMORE: *Atlanta Journal* v. *Mayson* (1893), supra, and *Williams* v. *Gunnels* (1881), 66 Ga. 521; *Riley* v. *Norton* (1884), 65 Iowa 306, and *Fountain* v. *West* (1867), 23 Iowa 9; *Edwards* v. *Knapp & Co.* (1888), 97 Mo. 432, and *Polston v. See* (1873), 54 Mo. 291. T. L. O'L.

---

STATUTES REQUIRING THE APPOINTMENT OF PUBLIC OFFICERS FROM CERTAIN POLITICAL PARTIES.—The mayor of Council Bluffs in accordance with a statute creating a board of police and fire commissioners for that city, appointed two democrats to serve as commissioners after four republicans had refused to accept the unsalaried offices. The statute provided that, "the said commissioners shall be selected from the two leading political parties, so that, as far as practicable, two members of the board shall be members of the dominant political party and one member of the board shall be a member of the political party next in numerical strength." In a recent case the constitutionality of this statutory provision was drawn in question, and it was decided that in was constitutional. The vigorous dissenting opinion by Mr. Justice WEAVER, Mr. Justice EVANS concurring in part, is based upon the ground that the proscription of any class of citizens from holding any office on account of political opinion is prohibited constitutionally by the inherent nature of a republican form of government and by the fair implication of the constitution as written. *State ex rel. Jones* v. *Sargent* (1910), — Ia. —, 124 N. W. 339.

Undoutedly the purpose of the statutory provision in question was to separate the police administration of Council Bluffs as far as possible from party politics. "For more than a quarter of a century, the current of public opinion and of federal and state legislation has been in the direction of establishing non-partisan boards or commissions for the administration of federal, state and municipal affairs." *Rathbone* v. *Wirth*, 150 N. Y. 459, 509. A survey of the cases involving this type of legislation shows that although such acts are quite general, yet there are important and far-reaching differences in phraseology.

For our purpose the cases involving the legislation under discussion may be generally divided into two groups. In the first class the statutes provide what might be termed a "negative qualification" e.g. not more than two members of said board shall belong to the same political party. These cases can give no aid in solving the problem of *State* v. *Sargent*, supra, as there is in them no law disqualifying the adherents of any political party to hold office. *Patterson* v. *Barlow*, 60 Pa. St. 54, 80; *People* v. *Hoffman*, 116 Ill. 587, 605; *Pearce* v. *Stephens*, 18 App. Div (N. Y.) 101; *State* v. *Bemis*, 45 Neb. 724; *Bowden* v. *Bedell*, 68 N. J. Law 451; *State* v. *Smith*, 35 Neb. 13, 16 L. R. A. 791; *Rogers* v. *Common Council*, 123 N. Y. 173, 9 L. R. A. 579; *McCarter* v. *McKelvey*, 73 Atl. (N. J.) 884. This type of legislation is held to be constitutional. So far, therefore, it seems established that there is at least one